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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the Reissue

Application Serial No: 09/014,518

Group Art Unit: 1615

Applicant:

Roderick Thompson Examiner:

Filed:

January 28, 1998

For:

U.S. Patent 5,472,790



PETITION UNDER 37 CFR §1.292

United States Department of Commerce
Patent and Trademark Office
Assistant Secretary and Commissioner of Patents
and Trademarks
Washington, D.C. 20231

Dear Sir:

Petitioner Progressive International Corporation of Kent, Washington, through its undersigned attorney, petitions the Commissioner to institute a public use proceeding under 37 CFR § 1.292 in respect to the above-identified reissue application. In support thereof, Petitioner submits:

1. Declaration of William Fishman, with Exhibits;
2. Declaration of John Stoneman, with Exhibits;
3. Declaration of John R. Benefiel, with Exhibits;
4. Supplemental Declaration of William Fishman with attached samples;
5. Declaration of Freling Baker with Exhibits; and
6. Declaration of Bruce K. Sauer with attachments.

REMARKS

These remarks are directed to the applicability of the prior sale and offer for sale of flexible plastic cutting mats in the United States to claims 1-11 currently presented in reissue application Serial No. 09/014,518.

The Declaration of John Stoneman and William Fishman prima facie establish an offer for sale and sales in the United States of flexible plastic extruded sheets intended for use as a kitchen

cutting mat. These sheets ranged in thickness from 9-12 mils (.009-.012 inches) and in sizes of 11 1/2" x 15", 12" x 14", 12" x 15" and 12" x 16".

This evidence indicates that sheets were constructed of extruded copolymer polypropylene, made from Hercules resin No. 7623 (Stoneman Declaration). The chart from the International Plastics Selector (1979) indicates that the Hercules 7623 material had a Rockwell hardness of R86 and flexural modulus of 210,000 psi. Actual samples of the 11 1/2" x 15" and 9 mil sheets are also submitted (Fishman Supplemental Declaration).

Furthermore, the OCM laboratory test on an actual sample confirm that its composition is copolymer polypropylene (Benefiel Declaration, Exhibit 1). This has not been disputed by the Applicant. The sheet samples have a lay flat characteristic and will support an article weighing 5 ounces when held at one end and flexed around the centerline, the article spaced at least 10" from the held end (Benefiel Declaration). These latter characteristics have also been admitted by the Applicant in the Supplemental Information Disclosure Statement filed in the Reexamination Proceeding.

The Counter-Maid product insert (Fishman Declaration) clearly describes cutting food items on the sheet and transferring the same to a container by flexing the sheet to create a funneling action.

The prior patent application of Mrs. Gillett confirms that the material was 9 mil polypropylene (Declaration of Freling Baker). This application may be considered as "competent and cogent evidence" of the nature of the Counter-Maid sheets, Smith v. Hall, 33 USPQ 249 (U.S. S.Ct. 1937).

The claimed method recited in claims 1-11 of the reissue application are thereby rendered unpatentable under 35 USC §§ 102(b) and 103. Although the flexural modulus value of 210,000 psi is listed for Hercules 7623, this is not substantially different than the upper range value of 200,000 psi of claims 6-9. Further, no criticality of the parameter has been shown, and hence copolymer polypropylene having a flexural modulus of 210,000 instead of

200,000 psi would be obvious under 35 USC §103.

It is noted that the term 'amorphous" found in claims 2 and 9, normally would mean noncrystalline or "atactic" polypropylene. Such noncrystalline polypropylene has no structural strength. See the publications Modern Plastics, Mid-November 1994 and Branson Technical Information, PW-1, 4/93. Thus, this term if normally interpreted caused the structure of claims 2 and 9 to be inoperative. If contrary to its normal meaning, "amorphous" is interpreted as describing semicrystalline copolymer polypropylene, then the claims are anticipated by the prior invention of Mrs. Gillett.

Accordingly, Petitioner respectfully requests institution of a public use proceeding in accordance with 37 CFR § 1.292.

Respectfully submitted,

Date: May 26, 1998

BY _____


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